No. 14786.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HALLDORA KRISTIN SIGURDSON,

Appellant,

vs.

ALBERT DEL GUERCIO,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

MISCELLANEOUS

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Statement of Pleadings and Jurisdictional Facts.

A verified complaint entitled "Complaint for Declaratory Judgment and Injunction" was filed on April 18, 1955, in the District Court for the Southern District of California by the appellant while at liberty on bond [3-10[1]]. The defendant was Albert Del Guercio, appellee herein, and officer in charge of the Los Angeles office of the United States Immigration and Naturalization Service [4].

Attorney for appellant incorrectly alleged statutory jurisdiction for the District Court under the Declaratory

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[1]Bracketed numbers refer to pages in printed Transcript of Record unless clearly different by context.

Judgments Act (Act of June 14, 1934, as amended, Title 28, U. S. C. A. 2201, *et seq.*) [3]. However, paragraph 111 of said complaint [4] very specifically spells out jurisdiction for a federal issue by alleging that defendant was an officer of the United States Immigration and Naturalization Service under the supervision and control of the Attorney General of the United States and the Commissioner of Immigration.[2]

The complaint alleged that an order for her deportation was issued on March 30, 1953 [9] on the ground that she had been a member of the Communist Party prior to her last entry [7][3] and that an actual controversy exists respecting the validity of said order, and the enforcement thereof [9].

She alleged that she had been granted a "so-called" hearing and that the Order of Deportation was predicated upon spurious Dictaphone belts, testimony of two witnesses, perjurers, and the decision of the immigration service hearing officer [9]. She alleged that the hearing officer:

1. Denied her the right to prove Dictaphone belts were spurious (testimony of two immigration officers showing belts impropriety was in record);

2. Admitted illegal and inadmissible evidence over valid legal objections;

3. Denied right of reasonable cross-examination of Government "expert" witness; and,

4. Failed, neglected and refused to comply with the law appertaining to conduct of deportation hearings [8].

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[2]United States Constitution, Article I, Section 8; 28 U. S. C. A. 1331; and, 8 U. S. C. A. 1251, *infra*.

[3]Internal Security Act of 1950, Section 22, 64 Stat. 987, 1006.

The complaint alleged that all administrative remedies were exhausted [5] and that prior to the filing of the complaint, she had filed a petition for writ of habeas corpus in the same District Court; that the petition for habeas corpus was denied and said decision of denial was affirmed on appeal to the United States Court of Appeals for the Ninth Circuit; and, that the Supreme Court of the United States had denied her petition for writ of certiorari [5].

The complaint alleged that the habeas corpus proceeding, *supra,* was a denial of due process [8].

Prayer of her complaint was for a judgment declaring:

1. Order of Deportation illegal and void and without force and effect; and,

2. Permanent injunction against deportation.

An order to show cause was issued same day with hearing set for April 25, 1955, thereafter continued until May 2, 1955. A temporary restraining order was issued restraining appellee from deporting appellant.

Appellant Del Guercio on April 22, 1955, filed his Notice of Motion to Dismiss, etc. [12-16], pursuant to Rule 12(b)(1), (6), (7), Federal Rules of Civil Procedure[4] on the following grounds:

1. District Court lacked jurisdiction and that complaint failed to allege statutory authority for jurisdiction;

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[4]Rule 12, Federal Rules of Civil Procedure, 28 U. S. C. A.:

"(b) Every defense . . . shall be asserted . . . except that the following defenses may . . . be made by motion:

(1) Lack of jurisdiction over the subject matter;

(6) Failure to state a claim upon which relief can be granted;

(7) Failure to join an indispensable party. . . ."

2. *Res adjudicata* by virtue of the prior decision in the habeas corpus proceedings; and,

3. Failure to join indispensable parties.

Appellant filed her counter points of authority in opposition to the motion to dismiss [17] setting forth that the District Court had jurisdiction and that the allegation of same was sufficient. It further set forth that all necessary parties were named defendant and that the prior ruling on the habeas corpus petition was not *res judicata.*

The Honorable Wm. M. Byrne, District Judge, granted the motion to dismiss and made and signed the Order of Dismissal on ground of lack of jurisdiction and dissolved the restraining order against deportation of appellant [19].

Appellant filed her Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from said Order on the same day, May 2, 1955 [20].

(Attention is directed to the stipulation wherein it shows that appellant's counsel asked for and was denied right to amend complaint [24].)

The District Court had jurisdiction by virtue of Section 10, Administrative Procedure Act of 1946, 60 Stat. 237, *et seq.,* 5 U. S. C. A. 1009,[5] which, while not properly alleged was shown by the pleading of a federal issue (see footnote 2) in the other paragraphs of the complaint, namely, deportation of alien. Moreover, appellant asked for and was denied permission to amend to correctly designate statutory jurisdiction for the lower court [24].

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[5]See appendix.

The United States Court of Appeals for the Ninth Circuit has jurisdiction by virtue of the timely filing of the Notice of Appeal [20] from the Order of Dismissal, a final judgment, 62 Stat. 929; 28 U. S. C. 1291.

Statement of the Case.

Appellant was born in Canada, of which country she is a national. She has been a resident of the Los Angeles area since 1944, a permanent resident since 1946 [6]. Her "Preliminary Form for Naturalization and Certificate of Arrival" was filed early in 1951 and she has been awaiting citizenship processing since then [6]. In 1949, she took a two-week vacation to Mexico and her re-entry at San Ysidro, California, was the basis for the immigration service charge that she had been a member of the Communist Party of the United States prior to her last entry [6], *supra.*

The alleged subversivism related to a short period while appellant was a student at the University of Southern California and allegedly consisted of membership in an organization called the John Reed Club, a communist cell at the university [7]. She has denied and continues to deny membership or attendance or even knowledge of the club.

On November 2, 1950 [6], in response to a request from the immigration officer, she went to the Los Angeles office of said service. There and then she was taken by two investigators, Habell and Chandler, to a small office and questioned continuously from approximately 1:00 P. M. to 4:45 P. M. with windows closed, despite temperatures of 91°, and continuous smoking by the two investigators. The interview was allegedly re-

corded in part by means of a Dictaphone, belt type. The recorder was operated by the investigators who testified at the deportation hearing that they were experienced with its operation and control and the type of sounds made on a playback of the belts and how they were made and when they were made. Three different transcripts of the alleged recording were presented to appellant for signature prior to the filing of the charge against her. She refused to subscribe her signature to any of them and in a verified written statement filed on November 20, 1950, with the service, she gave as her reasons for refusal to sign them, or any of them, that they, and each of them, were incomplete, inaccurate and not made freely and voluntarily, and, in said statement denied ever being a commie. She was without counsel on November 2, 1950, but has been represented by one since November 4, 1950, and secured said counsel upon the recommendation of her physician.

On October 11, 1951, appellant was served with a warrant of arrest for deportation on the ground that she had been a member of the Communist Party prior to her last entry [7], *supra*. She was granted a "hearing" by the agency and at said hearing an alleged typewritten statement (different from the other three), was admitted into evidence over proper and valid legal objections and proof that it was based upon spurious Dictaphone belts [8]. Government's own Examining Officer stated upon the record at the hearing that he had eight belts from said interview of November 2. Yet, playback of statement admitted required but five belts. The other three belts have never been introduced any where, despite habeas corpus order to show cause demanded production of them.

As previously set forth, two Government witnesses, Habell and Chandler, had been qualified as "experts" on Dictaphone use and operation and each testified at the hearing that on a playback of the belts used on November 2, 1950, a "click" would be audible to indicate each stopping and starting again of the recorder. It was the unanimous testimony that there were many, many stoppings of the machine during the interview. At the playback but one "click" was heard and never has this statement been challenged by the Government although repeatedly made by appellant.

Even though appellant forcefully believes that the testimony of the two witnesses was sufficient to challenge the belts, she sought and was denied right by the hearing officer [8] to have the belts examined by the experts of the Dictaphone manufacturer. In passing, we desire to point out that if the trial court had not dismissed the complaint, appellant would have produced the said experts from the Dictaphone firm to prove that the belts admitted at the hearing were not originals. At the hearing it was the opinion of the appellant that a matter as serious as this should be determined by the most competent experts available in order that justice be done.

The hearing officer denied reasonable cross-examination of Government "expert" witness whom appellant subsequently proved a perjurer by documentary evidence [8]. In his decision the hearing officer attempted to excuse the perjury by questionable language which verily showed his prejudice and unfairness. Now and before the immigration service, and at all times since, appellant has contended that the hearing officer had the right to believe even a proven perjurer, but when he, a quasi-judge, at-

tempted to justify his right to belief of the proven perjurer, and perjury, he evinced lack of fairness and displayed utter disregard of the rules on duties of hearing officer [8-9].

Appellant alleged in her complaint that by virtue of the Order of Deportation issued March 30, 1953 [5], she was about to be taken into custody and deprived of her liberty in violation of due process of law [5] and that an actual controversy exists between appellant and appellee with respect to the validity of said order and enforcement, thereof [9]. She prayed that the District Court would grant her a declaratory judgment that the said order was illegal and void and without force and effect and a permanent injunction against deportation [9-10], alleging that she had no plain, speedy or adequate remedy to prevent her summary removal from the United States [10].

Appellant exhausted all administrative remedies [5] and in 1953, after being taken into custody under the said order, she filed her petition for writ of habeas corpus in the same district court. Her petition for writ was denied and the trial court was affirmed on appeal (215 F. 2d 791); petition for writ of certiorari to the United States Supreme Court was denied (348 U. S. 916).

Appellee filed his motion to dismiss on the grounds previously set forth under Rule 12 (b)(1), (6), and (7), Federal Rules of Civil Procedure, *supra*.

Appellant requested and was denied permission by the trial court to amend complaint to correctly allege statutory claim for jurisdiction [24]. The motion to dismiss the complaint was granted [19].

It is respectfully contended by the appellant that she had the right to amend her complaint before responsive pleading by appellee, *infra,* and that she had the right to prosecute her complaint against appellee alone in accord with the relief provided by Congress and which the Supreme Court has declared is an appropriate procedure, *infra;* that the prior ruling on the habeas corpus proceedings was not a bar; and, that the trial court abused its discretion in denying her the right to amend, as aforesaid, for the reason that it would be in interests of justice, *infra,* and that the complaint in paragraphs III [4], V [5], VIII [5], X [6], XIV [7], XV [7], XVI [8], XVIII [8], XIX [9], and XX [9], as well as the prayer, all show that a federal question is involved and alleged in such a manner as to cure the erroneous designation of statutory jurisdiction. The complaint is not defective, albeit admittedly in error as set forth herein.

Specifications of Error.

The appellant makes the following specifications of error of the District Court:

I.

The District Court erred in making said judgment and order.

II.

The District Court had jurisdiction of the action set forth in the complaint by virtue of the allegations of paragraphs III, V, VIII, IX, XIV, XVI, XVII, XVIII, XIX and XX of appellant's complaint, *supra,* which clearly show a federal question and a subject matter over which the federal government has exclusive control, namely, deportation of aliens.

III.

The prior adverse ruling in the habeas corpus proceeding was not *res judicata* or a bar via estoppel for the reason that Congress provided the relief of the provisions of the Administrative Procedure Act in addition to the constitutional relief of habeas corpus because of the extreme limitations of review in the latter and its desire to insure aliens a full and complete opportunity to secure justice and avoid deportation of worthy aliens victims of error and deception.

IV.

The District Court had the power to permit the appellant right of amendment of the allegation of statutory authority for jurisdiction and to do so would have been in the interests of justice, particularly, when appellant asked permission to amend, and having the power and jurisdiction to allow amendment, it abused its discretion when it denied that right to appellant [24].

V.

The District Court erred in dissolving the temporary restraining order because in so doing it denied appellant the right to secure relief while at liberty as Congress provided.

ARGUMENT.

POINT ONE.

Habeas Corpus Not Exclusive Relief From Administrative Order of Deportation.

Denial of Habeas Corpus No Bar nor Does It Estop Relief Under Section 10 of Administrative Procedure Act.

Relief of Judicial Review of Order of Deportation Is Grant by Congress to Alien in Addition to Habeas Corpus Provided by Constitution Which Congress Cannot Suspend Under Circumstances.

Prior to the adoption of the Administrative Procedure Act of 1946 (Act of June 11, 1946, 60 Stat. 237, *et seq.*), the only legal procedure available to an alien to test the validity of an administrative order of deportation was by petition for writ of habeas corpus, *Bridges v. Wixon,* 326, U. S. 135, a right guaranteed by Art. I, Sec. 9, Clause 2, of the Constitution which reads: "The Privilege of the Writ of Habeas Corpus shall not be suspended . . ." The review, traditionally limited, primarily related to a determination of due process. *Eagles v. Samuels,* 329 U. S. 304, 311.

Sung v. McGrath, 339 U. S. 33, held that the Administrative Procedure Act, *supra,* was applicable to deportation cases. Thereupon, Congress expressed its will, intention and purpose by exempting proceedings before the immigration service from provisions of Sections 5, 7, and 8 of the Administrative Procedure Act (64 Stat. 1048), hereinafter designated as the APA for convenience of all. This exemption by Congress was in accord with Section 12 of the APA ". . . No sub-

sequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly. . . ."

Heikkila v. Barber, 345 U. S. 229, held that the APA did not apply to the provisions of the Internal Security Act of 1950 (64 Stat. 1006), because of the interpretation given the term "final" regarding the decision of the Attorney General to deport an alien. However, *Heikkila* was specifically not a ruling on the 1952 Immigration and Naturalization Act (66 Stat. 163), see *Heikkila v. Barber, supra,* footnote 4.

Pedreiro v. Shaughnessy, 349 U. S. 48, has held that an alien may, under the 1952 Act, secure injunctive relief under the provisions of Section 10 of the APA, *supra.* The remedy, said the Supreme Court, is an appropriate one and an alien is not limited to review by habeas corpus. It further held that the Attorney General was not an indispensable party to the action. Moreover, *Pedreiro* declared that a second action would not injure the Government, but, *sub silentio,* could abet an alien.

The foregoing brief chronology shows that we must presume that Congress originally intended to grant judicial review to aliens in accord with the APA; changed its mind by specifically withdrawing the privilege, *supra;* and, then in the 1952 Act, Congress reinstated the privilege.

It is evident that Congress had been undecided as to just which policy is in the best interest of our country and fair and proper for aliens in accord with the American policy of fair play. The fact is positive, insofar as appellant's complaint is concerned, that as of April 18,

1955, the date of its filing [10], the Supreme Court has decreed that the existing will, purpose and intention of Congress was to extend the relief of judicial review. *Pedreiro v. Shaughnessy, supra.* It follows that the trial court had jurisdiction, providing that appellant was not barred or estopped from asserting same by the prior adverse ruling on her habeas corpus petition.

When the APA was enacted in 1946, the Constitutional guarantee of habeas corpus, *supra,* was available. It was available continuously during the period when Congress was wavering in its position. It would be presumptuous for anyone to argue that Congress was unmindful of the Constitutional guarantee or that Congress intended to substitute judicial review under APA for the review required by the Constitution.

It was the intention of Congress under the 1952 Act, *supra,* to grant an alien the additional remedy of judicial review and injunctive relief under Section 10 of the APA.

The view is clear and certain from the remarks made by the co-authors of the bill, Congressman Walters and the late Senator McCarran, and we quote:

> ". . . In view of the fact that every person who is ordered deported has all of these administrative procedures available, *plus an appeal to the court, plus the right to a writ of habeas corpus . . .*" (Emphasis added.)
>
> Congressman Walters, 98 Cong. Rec. 4415, 4416.
>
> "The Administrative Procedure Act is made applicable to this bill. The A.P.A. prevails now."
>
> Senator McCarran, 98 Cong. Rec. 5778.

Appellant's action for judicial review and injunction was filed in accord with the purpose and intention of Congress expressed both in the enacting and passage, thereof.

Said law did not suspend the right of habeas corpus, nor could it; said law did not create the situation where two remedies were available, requiring an election, nor could it; said law did not state which procedure should come first as that would have to be determined by the exigencies of each deportation matter.

It is elementary that *res judicata* does not apply to habeas corpus. *Salinger v. Lansel,* 265 U. S. 224, 230. Even when the same grounds are urged in a second petition for habeas corpus, the Supreme Court has decreed in *Wong Doo v. U. S.,* 265 U. S. 239, 241 (immigration case) that the first ruling *may properly* be given controlling weight, but the trial court to whom it is presented should be guided by a rationalization of the facts and circumstances.

Besides, where the doctrine of *res judicata* or any form of bar would be inconsistent with the expressed will of Congress *(cf. Pedreiro, supra)* or the method devised and enacted by Congress, the doctrine will not be enforced by the courts. *Denver Bldg. Trades v. N. L. R. B.,* 186 F. 2d 326; reversed on other grounds in 341 U. S. 675.

When appellant filed her complaint, she was seeking a judicial review which applied a statutory standard of review which required the reviewing court to determine from the whole record whether there was substantial evidence to warrant the order of deportation. To that

scope of review, Congress says she is entitled and the Supreme Court has approved.

Pedreiro v. Shaughnessy, supra;

Kristensen v. McGrath, 340 U. S. 162;

Universal Camera Co. v. N. L. R. B., 340 U. S. 474;

Heikkila v. Barber, 345 U. S. 229, 236.

The verity of the allegations of appellant's complaint will be established beyond question by the scope of review required under Section 10 of the Administrative Procedure Act. Truth will not injure the Government, but will make it possible for appellant to be vindicated and become a citizen of the United States for which she has been waiting since 1951 [6]. The will and intention of Congress, as expressed in the 1952 Act, should be permitted by this Court.

POINT TWO.

District Court Acted Arbitrarily in Denying Appellant's Request to Amend Complaint to Correctly Designate Statutory Authority for Jurisdiction.

The provisions of 28 U. S. C. A. 1331 declare that federal district courts shall have jurisdiction of matters arising under the laws of the United States.[6] Deportation is a federal matter and under the laws of the United States the Attorney-General determines whom shall be

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[6]28 U. S. C. A. 1331, Act of June 25, 1948, 62 Stat. 930:

"The district courts shall have original jurisdiction of all civil actions . . . under the Constitution, laws or treaties of the United States."

ordered deported. Act of June 27, 1952, 66 Stat. 204; 8 U. S. C. A. 1251.[7]

Appellant's complaint, paragraph III [4] recites that appellee is a link in the chain of immigration law enforcement under the supervision and control of the Attorney-General. Paragraph V, thereof [5], recites that there was an outstanding Order of Deportation which had been issued March 30, 1953.

We respectfully submit that such allegations cured the error in paragraph II [3] where jurisdiction is incorrectly alleged under the authority of the Declaratory Judgments Act. See, *Skelly Oil Co. v. Phillips,* 339 U. S. 667, 672.

Appellee had filed no responsive pleading and appellant was entitled to amend as a matter of course. Leave of court was not necessary and it was error to deny leave when sought.

> Rule 15(a), Fed. Rules Civ. Proc., 28 U. S. C. A., *infra;*
>
> *Rogers v. Girard Trust Co.,* 159 F. 2d 239, 241;
>
> *Lloyd v. United Liquor Corp.,* 203 F. 2d 789, 793.

It is neither the purpose nor the policy of the Federal Rules of Civil Procedure to sacrifice substance to form. Their purpose is to provide an adjudication on merits rather than a determination on technicalities of procedure and form. Rule 8(a) provides "A pleading shall contain . . . (1) a short statement of the grounds upon

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[7] 8 U. S. C. A., Act of 1950, as amended, 64 Stat. 987:
"(a) Any alien in the United States (including an alien crewman) shall upon order of the Attorney General, be deported, who . . ."

which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) . . ."

Rule 8(f) provides "All pleading shall be so construed as to do substantial justice." There was no construal in the light of substantial justice when the District Court refused right to amend, dismissed complaint and refused to grant appellant's counsel twenty-four hours to apply to this Honorable Court for relief.

Rule 15(a) provides "A party . . . may amend his pleadings only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . ." *Copeland Motors v. General Motors,* 199 F. 2d 566.

The District Court should have granted the application to amend because justice for a girl fighting to prove her worthiness to remain in the United States demanded it.

The Order of Dismissal is error and should be reversed.

Respectfully submitted,

John P. Tobin,

Attorney for Appellant.

APPENDIX.

Section 10 of the Administrative Procedure Act of 1946.

(3) "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

"(a) Right of Review.—Any person suffering legal wrong because of any agency action ar adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"(b) Form and Venue of Action.—The form of proceeding for judicial review shall be any special stautory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

"(c) Reviewable Acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action.

"(e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitu-

tional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (a) compel agency action unlawfully withheld or unreasonably delayed; and (b) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole proceeding or such portions thereof as may be cited by any party, and due accounts shall be taken of the rule of prejudicial error." 60 Stat. 243, 5 U. S. C. 1009.